By order of the Bankruptcy Appellate Panel, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8013-1(b). See also 6th Cir. BAP LBR 8010-1(c).

File Name: 06b0007n.06

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

In re: NATIONAL CENTURY FINANCIAL ENTERPRISES, INC.,	)	
Debtor.	)	
LONG TERM CARE MANAGEMENT, INC., QUALITY LONG TERM CARE MANAGEMENT, INC., and QUALITY LONG TERM CARE, INC.,	)	
Appellants,	)	
v.	)	No. 05-8048
VI/XII COLLATERAL TRUST,	)	
Appellee.	)	

Appeal from the United States Bankruptcy Court
for the Southern District of Ohio, Eastern Division
Chapter 11 Case No. 02-65235

Argued: February 1, 2006

Decided and Filed: March 14, 2006

Before: LATTA, SCOTT, and WHIPPLE, Bankruptcy Appellate Panel Judges.

COUNSEL

ARGUED: Yvette A. Cox, BAILEY CAVALIERI, Columbus, Ohio, for Appellants. Matthew A. Kairis, JONES DAY, Columbus, Ohio, for Appellee. **ON BRIEF:** Yvette A. Cox, Timothy A. Riedel, BAILEY CAVALIERI, Columbus, Ohio, Charles E. Slyngstad, MORRIS, POLICH &

PURDY, Los Angles, California, for Appellants. Matthew A. Kairis, J. Todd Kennard, Sean P. Byrne, JONES DAY, Columbus, Ohio, for Appellee.

OPINION

MARY ANN WHIPPLE, Bankruptcy Appellate Panel Judge. Long Term Care Management, Inc., Quality Long Term Care Management, Inc., and Quality Long Term Care, Inc. (the "Appellants") appeal an order interpreting and enforcing a provision of the plan of liquidation (the "NCFE Plan") of National Century Financial Enterprises, Inc. ("NCFE") and its affiliates and holding the Appellants in contempt for violating that provision. For the reasons that follow, we conclude that the order on appeal should be **AFFIRMED** in part and **REVERSED** in part.

I. ISSUES ON APPEAL

The issues presented are whether the bankruptcy court erred in (1) determining that the Appellants' prosecution of an adversary proceeding against NPF XII, Inc. ("NPF XII") and NCFE in the United States Bankruptcy Court for the District of Nevada violates an injunction in the confirmed NCFE Plan, and (2) holding the Appellants in contempt for initiating that proceeding.[1]

II. JURISDICTION AND STANDARD OF REVIEW

An order interpreting and enforcing a Chapter 11 plan constitutes a final order. *See UNR Indus., Inc. v. Bloomington Factory Workers (In re UNR Indus., Inc.)*, 173 B.R. 149, 154 n.6 (N.D. Ill. 1994). Similarly, the bankruptcy court's order holding the Appellants in contempt is a final appealable order. *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149, 1154 (7th Cir.

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[1] While the bankruptcy court enjoined the Appellants from proceeding with the adversary proceeding, there was already an injunction in place (in the confirmed NCFE Plan). Accordingly, the court's order is, in effect, a declaratory judgment determining that the initiation and continued prosecution of the proceeding contravenes the NCFE Plan's injunction.

1984).[2] Thus, the bankruptcy court's order may be appealed as of right. 28 U.S.C. § 158(a)(1). The United States District Court for the Southern District of Ohio has authorized appeals to the Bankruptcy Appellate Panel (the "BAP"), and neither party has timely elected to have this appeal heard by the district court. 28 U.S.C. §§ 158(b)(6), (c)(1). Accordingly, the BAP has jurisdiction to decide this appeal.

"A decision on a contempt petition is within the sound discretion of the trial court and thus is reviewed only for an abuse of discretion." *Elec. Workers Pension Trust Fund of Local Union #58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003) (citing *Peppers v. Barry*, 873 F.2d 967, 968 (6th Cir.1989)); *accord*, *United States v. Grable*, 98 F.3d 251, 253 (6th Cir. 1996). Likewise, a bankruptcy court's interpretation of the provisions of a plan it has confirmed is entitled to "full deference," and its exercise of equitable powers to "breathe life" into the provisions of a plan is reviewed under an abuse of discretion standard. *Terex Corp. v. Metro. Life Ins. Co. (In re Terex Corp.)*, 984 F.2d 170, 172 (6th Cir. 1993). "An abuse of discretion is defined as a 'definite and firm conviction that the [court below] committed a clear error of judgment.' The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion." *Mayor & City Council v. W. Va. (In re Eagle-Picher Indus., Inc.)*, 285 F.3d 522, 529 (6th Cir. 2002); *accord*, *e.g.*, *Gary's Elec. Serv. Co.*, 340 F.3d at 378. "Under this standard, a [trial] court's decision is to be afforded 'great deference;' it will be disturbed only if the [trial] court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.'" *Gary's Elec. Serv. Co.*, 340 F.3d at 378 (citing *Blue Cross & Blue Shield Mut. v.*

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[2] Generally, an order finding a party in civil contempt is appealable only if it includes both a finding of contempt and the imposition of a sanction. *Motorola, Inc.*, 739 F.2d at 1154. The order appealed from did not determine a sanction for contempt. However, the bankruptcy court later entered an order on October 18, 2005, fixing the amount of attorney's fees and expenses as the sanction. The Appellants filed a second notice of appeal on October 28, 2005, but the notice challenged only the June 2 order, not the October 18 agreed order. Accordingly, the BAP entered an order on December 16, 2005, dismissing the appeal initiated by the October 28 notice without prejudice to the Appellants' right to proceed with the appeal initiated by the June 10 notice. Since the sanction has been determined, the order being appealed is final.

Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir.1997)); *accord*, *e.g.*, *Schmidt v. Boggs (In re Boggs)*, 246 B.R. 265, 267 (B.A.P. 6th Cir. 2000).

III. FACTS

NCFE and its subsidiaries, including NPF XII, were in the business of financing accounts receivable for healthcare providers, including the Appellants. On January 26, 2001, the Appellants filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Nevada. Their joint plan of reorganization (the "QLTM Plan") was confirmed on October 21, 2002. Paragraph 4.09 of the plan declared that NPF XII had Allowed Claims in specific amounts in Classes 1, 2, and 3, and Paragraphs 3.04 and 3.05 provided that NPF XII had Allowed Claims in specific amounts in Classes 4 and 5. Paragraph 4.09 then continued, in pertinent part:

> The NPF[3] Claims in Classes 1, 2, 3, 4, and 5 are Allowed Claims and shall not be subject to any counterclaim, credit, deduction, setoff, recoupment, claim for equitable or other subordination, or any other defense or claim . . . .

Paragraph 11.04 of the QLTM Plan specified that the plan provisions for NPF XII's claims represented a compromise:

> Pursuant to Bankruptcy Rule 9019, all issues regarding existing or potential litigation related to all claims held by NPF, Hostmasters, QLTCN, and Steven Pavlow shall be, and hereby are compromised pursuant to the treatment provided for each in the Plan. In connection with this compromise, the Debtors, the Estates, the Committee, Hostmasters, NPF, QLTCN, and Steven Pavlow shall and do hereby mutually forever relieve, release, and discharge each other and their respective successors, affiliates, attorneys, accountants, representatives, parents, partners, officers, directors, and stockholders, and each of them, from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs and expenses (including but not limited

[3] The QLTM Plan defined "NPF" as "NPF XII, Inc." (QLTM Plan ¶ 1.42, Appellant's Am. App. at 57.)

> to, attorneys' fees), damages, judgments, actions, and causes of action, of whatever kind or nature, including, but not limited to, any claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs, expenses, damages, actions, causes of action, counterclaims, set-off, or judgments based on, arising out of, or in connection with any matter that has arisen from the beginning of time through the Confirmation Date. The Allowed Claims of NPF and Hostmasters provided for under the Plan are not subject to any counterclaim, credit, deduction, set-off, recoupment, claim for equitable or other subordination, or any other defense. . . .

More than $170,000 had been distributed on account of NPF XII's claims in the Appellants' Chapter 11 cases as of May 2004. Those cases were closed on December 20, 2002, and a final decree was entered on December 31, 2002.

On November 18, 2002, NCFE and a number of its subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio. On December 26, 2002, the court established April 22, 2003, as the deadline for filing proofs of claim, and notice of the bar date was sent to creditors, including the Appellants, on December 28, 2002. The Appellants did not timely file a proof of claim.

On April 16, 2004, the court confirmed the NCFE Plan. The plan established the VI/XII Collateral Trust (the "Trust") for assets of NPF VI and NPF XII, and the assets transferred to the Trust free and clear of liens and claims included NPF XII's right to payments under the QLTM Plan. Article XI of the NCFE Plan provides, in pertinent part.

A. Term of Injunctions or Stays

> Unless otherwise provided, all injunctions or stays provided for in the Bankruptcy Cases pursuant to sections 105 or [*sic*] 362 of the Bankruptcy Code, or otherwise, and in existence at the Confirmation Date prior to the entry of the Confirmation Order, shall remain in full force and effect until the closing of the Bankruptcy Cases.

B. Injunctions

> 1. Except as provided in the Plan or the Confirmation Order, as of the Effective Date, all entities that have held, currently hold or may hold a claim or other

> debt or liability that is released, waived, settled or deemed satisfied pursuant to the Plan or an Interest or other right of an equity security holder in the Debtors that is terminated pursuant to the terms of the Plan will be permanently enjoined from taking any of the following actions on account of any such claims, debts, liabilities, Interests or rights against any entity released pursuant to the Plan (unless otherwise agreed by an entity released pursuant to the Plan) and against the Trusts, their respective property and/or the assets of the Estates retained and enforced by the Trusts as the representatives of the Estates appointed for that purpose pursuant to section 1123(b)(3)(B) of the Bankruptcy Code: (a) commencing or continuing in any manner any action or other proceeding, other than to enforce any right pursuant to the Plan to a distribution; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order, other than as permitted pursuant to clause (a) above; (c) creating, perfecting or enforcing any lien or encumbrance against the Debtors, the Trusts or their respective property; (d) asserting a setoff or right of subrogation of any kind against any debt, liability or obligation due to the Trusts or any released entity; (e) asserting a setoff of any kind against any debt, liability or obligation due to any released entity; and (f) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan. Nothing in this Section XI.C.1. shall be deemed, in and of itself, to enjoin or otherwise impair the right or ability of any party to assert any affirmative defense or Defensive Counterclaim to which it is otherwise entitled in any action or proceeding brought against such party by any of the Trusts. Notwithstanding anything to the contrary in this Plan or the Confirmation Order, no party shall be enjoined from taking action to determine the amount, validity or priority of, or to recharacterize or subordinate, any claim or lien of any Debtor in the Providers' respective bankruptcy cases, and the court with jurisdiction over the Providers' bankruptcy cases shall retain full jurisdiction to determine such matters with respect to any such claim or lien of any Debtor.

Article I.A. Section 117 of the NCFE Plan defines "Provider" as "any healthcare company or practitioner that was a healthcare financing client or customer of one or more of the Debtors through . . . the participation in the Debtors' accounts receivable financing program," and so the term includes the Appellants. According to the Trust, the last sentence of Article XI.C., quoted above, was intended to apply only with respect to claims asserted in Providers' bankruptcy cases that had not yet been resolved. The NCFE Plan retained the court's jurisdiction to allow or disallow claims, enter orders that are necessary or appropriate to implement or consummate the plan, resolve disputes regarding the interpretation or enforcement of the plan, and issue and enforce injunctions contained

in the plan and confirmation order as necessary or appropriate for the plan's implementation. The confirmation order reiterated the injunctions quoted above.

On November 17, 2004, the Appellants initiated an adversary proceeding against NPF XII and NCFE in the Nevada bankruptcy court, alleging that the defendants "concealed from Plaintiffs, Plaintiffs' other creditors and the Bankruptcy Court material facts which if known to the parties involved would have materially affected the commitment to pay Defendant NCF $1,300,000 under the Joint Plan." More specifically, the Appellants alleged that NCFE and NPF XII committed securities fraud and that the fraud "had the effect of driving up the cost to the Plaintiffs of doing business with NCFE and caused the Allowed Claims in the Plaintiffs' bankruptcy proceedings to be inflated."[4] The complaint provides no further detail regarding the alleged fraud or how it induced the settlement with NPF XII.[5] *See* Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 9(b) (requiring that fraud be pleaded with particularity). Although the FBI executed a search of NCFE's business headquarters one month after confirmation of the QLTM Plan, the Appellants waited two years after the FBI investigation before filing their complaint against NPF XII and NCFE.

On December 30, 2004, the Trust filed its Motion to Enforce Confirmation Order in the Ohio bankruptcy court, seeking an injunction prohibiting the Appellants from further prosecuting the Nevada adversary proceeding and sanctions for initiating that proceeding. On June 2, 2005, the court granted the Trust's motion, permanently enjoining the Appellants from pursuing the adversary proceeding and ordering the payment of attorney's fees and expenses as a sanction. On June 10, 2005, the Appellants timely filed a notice of appeal.

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[4] The Appellants represent that "[c]onfirmation of the QLT Plan occurred less than one month before the Federal Bureau of Investigation executed a search warrant at NCFE's business headquarters," implying that the Appellants had no reason to suspect fraud until November 2002. There is no evidence that they did not know or have reason to know about the NCFE companies' activities before the QLTM Plan was negotiated and confirmed, and there is no evidence as to why the Appellants waited for two years after the FBI search before taking action.

[5] The Trust contends that the NCFE companies' conduct actually benefitted the Appellants to the detriment of the creditors that are Trust beneficiaries.

IV. DISCUSSION

A. Did the Ohio bankruptcy court have jurisdiction to decide the Trust's motion?

The Appellants assert that the bankruptcy court lacked jurisdiction to enjoin the prosecution of the Nevada adversary proceeding. The BAP disagrees. The interpretation and enforcement of the NCFE Plan was within the jurisdiction of the court that confirmed the plan. *Holly's, Inc. v. City of Kentwood (In re Holly's, Inc.)*, 172 B.R. 545, 557 (Bankr. W.D. Mich. 1994), *aff'd*, 178 B.R. 711 (W.D. Mich. 1995). The Appellants' "jurisdiction" argument is really an assertion that, under principles akin to comity, the Ohio court should defer to the Nevada court. The issue raised by the Trust's motion, however, was one of interpretation of the NCFE Plan, not the QLTM Plan, so the court confirming the NCFE Plan was the proper court to decide that motion.

B. Did the Ohio bankruptcy court abuse its discretion in its interpretation of the NCFE plan?

The Appellants do not dispute that the general injunctions set forth in Section XI.B. and the first sentence of Section XI.C.1. of the NCFE Plan would otherwise prohibit their adversary proceeding against NCFE and NPF XII. Rather, they take the position that the exception to the injunctions stated in the last sentence of Section XI.C.1. of the plan applies to permit them to pursue the adversary proceeding in the Nevada bankruptcy court. That sentence reads:

> Notwithstanding anything to the contrary in this Plan or the Confirmation Order, no party shall be enjoined from taking action to determine the amount, validity or priority of, or to recharacterize or subordinate, any claim or lien of any Debtor in the Providers' respective bankruptcy cases, and the court with jurisdiction over the Providers' bankruptcy cases shall retain full jurisdiction to determine such matters with respect to any such claim or lien of any Debtor.

The bankruptcy court held that this exception does not apply, because NPF XII's claims had already been determined when the Nevada court confirmed the QLTM Plan, which fixed the amount, validity, and priority of the claims with all defenses expressly waived or released. The bankruptcy judge reasoned that the Appellants were attempting to "undo a Court approved settlement agreement,

not 'determine the amount, validity, priority of, or to recharacterize or subordinate, any claim or lien' of the Debtors." (Appellant's Am. App. at 267.) In other words, the bankruptcy court concluded that the exception applies to "determinations" of claims, not to attempts to "*re*determine" claims.

According "great deference" to the bankruptcy court's interpretation of the plan it confirmed, as the BAP must do, it cannot be said that the court's reading of the exception constitutes an abuse of discretion. The NCFE Plan broadly prohibited litigation against NCFE and its subsidiary debtors, but carved out the ongoing claims allowance process in Providers' own bankruptcy cases. A reasonable person could well conclude that the claims allowance process in the Appellants' Chapter 11 cases was completed vis-à-vis NPF XII in October 2001 when the QLTM Plan was confirmed.

The Nevada adversary proceeding represents an attempt by the Appellants to obtain relief for their failure to undertake due diligence before entering into a settlement with NPF XII regarding the validity, amount, and priority of its claims, which settlement, including a waiver of all defenses to the allowed claims, was approved by an order of the Nevada bankruptcy court that became final more than two years before the initiation of that proceeding. *See* 11 U.S.C. § 1144 (a confirmation order may be revoked only if procured by fraud and only until 180 days after the date of entry). The Ohio bankruptcy court did not abuse its discretion in interpreting the NCFE Plan as enjoining those efforts because the claims allowance process had been completed as to NPF XII in October 2001.

C. Did the Ohio bankruptcy court err in sanctioning the Appellants for contempt?

The burden of proof for establishing civil contempt is high. "In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order. A litigant may be held in contempt if his adversary shows by clear and convincing evidence that 'he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.'" *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991) (citations omitted). "Civil contempt, however, does not require a finding of willfulness or bad faith, for it serves a remedial rather than a punitive purpose.

It is enough if the order violated is specific and definite, and that the offending party has knowledge of it." *In re Elias*, 98 B.R. 332, 337 (N.D. Ill. 1989) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 499 (1949)); *accord*, *e.g.*, *NLRB v. H & H Pretzel Co.*, No. 86-5210, 1990 WL 337117, at *4 (6th Cir. June 27, 1990).

The Appellants do not dispute that they had knowledge of the injunctions established by the Ohio bankruptcy court's confirmation of the NCFE plan. The issue is whether the injunction language is definite and specific enough to support a finding of contempt. The bankruptcy court did not include or consider this as an element of contempt in its analysis. Although the injunction language is broad, the carve-out for "action[s] to determine the amount, validity or priority of, or to recharacterize or subordinate, any claim or lien of any Debtor in the Providers' respective bankruptcy cases" is also broad. The Appellants were indisputably included within the definition of Providers and they were debtors in a bankruptcy case that had not been closed at the time the NCFE cases commenced. The NCFE debtors anticipated that their claims against Providers would be subject to litigation in Provider cases in other bankruptcy courts around the country. The Ohio bankruptcy court's interpretation of the exception to apply only to nascent or ongoing claims determination processes in other courts was reasonable and well within its discretion. But the distinction between ongoing and completed claims determination processes in Provider's own bankruptcy cases is not sufficiently definite and specific in the language of the exception to support a finding of contempt against the Appellants for initiating the Nevada adversary proceeding. The exception also authorized "recharacteriz[ing]" any NCFE debtor's claim in a Provider's bankruptcy case, requiring the Ohio bankruptcy court to find implicitly that the Appellants' Nevada action was not an attempt to "recharacterize" NPF XII's Allowed Claim within the meaning of the NCFE plan. The carve-out language could reasonably be interpreted as permitting the initiation and prosecution of the Nevada adversary proceeding. The BAP is of the opinion, therefore, that the bankruptcy court abused its discretion in holding the Appellants in contempt.

V. CONCLUSION

For the foregoing reasons, the bankruptcy court's interpretation of the NCFE Plan as enjoining the Nevada bankruptcy court adversary proceeding is **AFFIRMED**, but the court's order holding the Appellants in contempt for initiating and prosecuting that proceeding is **REVERSED**.